

December 11, 2003

Filed Electronically

**EX PARTE**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: WC Docket No. 03-194 - *In re: Application by Qwest Communications International Inc. for Authority to Provide In-Region, InterLATA Services in Arizona*

Dear Ms. Dortch:

Eschelon submits this Ex Parte letter regarding the application of Qwest Communications International, Inc. ("Qwest") for authorization under Section 271 of the Communications Act for authority to provide In-Region, InterLATA services in Arizona. Specifically, Eschelon seeks to clarify the record relating to footnote 36 to paragraph 13 of the Commission's December 3, 2003 Memorandum Opinion and Order in this matter ("Footnote 36"). Footnote 36 suggests that Eschelon had – and failed to meet – obligations and burdens that apply when a Party files Comments and seeks a ruling consistent with its position. The filing in question by Eschelon, however, did not even purport to be Comments and did not make such a request. As set out below, Eschelon simply made an Ex Parte filing to comply with a specific request from the Department of Justice ("DOJ") to provide materials to the FCC pursuant to the permit-but-disclose Ex Parte rules. In its current form, Footnote 36 punishes Eschelon for this cooperation with a government agency by erroneously suggesting that Eschelon violated the rules and failed to meet a burden. Footnote 36 should be corrected to eliminate this harmful suggestion.

Because, as explained below, this appears to be a misunderstanding, Eschelon hopes that this issue can be resolved simply, such as by the FCC correcting or deleting Footnote 36 on its own motion or on an errata basis. Given that resource constraints have been a concern throughout this proceeding, all Parties may want a simple resolution. If, however, Eschelon needs to file a more formal exception before the deadline, it may do so. It files this letter before doing so, however, in the hope that the record can be corrected with the least effort by all.

Enclosed is a copy of an email from the DOJ confirming that Eschelon made the filing in question at the request of the DOJ. In the enclosed email, the DOJ states:

Staff requested that Eschelon file the materials Eschelon submitted to the Department of Justice for our review during Qwest's 271 application for Arizona as ex parte materials with the FCC, pursuant to the FCC's March 23, 2001 Public Notice and the September 4, 2003 Public Notice (Arizona-specific filing requirements).

See Email from J. Smith of the U.S. DOJ to K. Clauson & J. Oxley of Eschelon (Dec. 4, 2003) (enclosed).<sup>1</sup>

The Public Notices cited by the DOJ as the basis for its request that Eschelon file the materials are the *same* Public Notices which the FCC suggests in Footnote 36 that Eschelon ignored. When the DOJ indicated to Eschelon that Eschelon needed to file copies of the materials to comply with the Public Notices, Eschelon did just as it was requested to do. (Similarly, Eschelon provided the materials to the DOJ in the first place in response to requests from the DOJ and to show its cooperation when asked to provide information.)<sup>2</sup> Under the Ex Parte rules, Parties must submit copies of written materials to the FCC. Per the DOJ's request, Eschelon did just that. While the FCC may be in a position to evaluate whether the DOJ's reading of the Ex Parte rules or the Public Notices is consistent with its own, Eschelon was not in a position to challenge the DOJ's reading of those Notices. Eschelon wanted to show its cooperation with the government agency and did so by making the filing as requested. Now, Footnote 36 suggests that Eschelon violated the very rules with which it was acting to comply, per communications with the DOJ.

Eschelon's Ex Parte filing that is the subject of Footnote 36 was dated September 18, 2003 and posted September 22, 2003. Apparently, the date of the filing happened to be on or near the date on which Comments were due in the proceeding. After the fact, it appears that this may have caused some confusion at the FCC. Eschelon, however, did not file Comments in this proceeding at that time. Eschelon merely responded to the specific request from the DOJ to file with the FCC copies of materials that the DOJ had

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<sup>1</sup> In the enclosed email, the DOJ goes on to state that it is its current understanding that Eschelon's filing did not comply with the rules and refers Eschelon to the FCC as to the basis for that understanding. Eschelon called the named contact at the FCC, but the FCC did not identify any rule with which Eschelon did not comply. There was some question as to whether the FCC had the same view as that of the DOJ as to whether the rules *required* an Ex Parte filing, but no rule was cited as having been violated.

<sup>2</sup> The materials submitted by Eschelon state on their face that they were provided to the DOJ in response to requests for information from the DOJ. See, e.g., page 97 of Eschelon's October 8, 2003 filing in this matter (an email to the DOJ which begins: "In response to your request for details . . ."). In response to a telephone call by the FCC directly to a legal secretary at Eschelon asking Eschelon to number the pages consecutively, Eschelon re-filed the materials in electronic form on October 8, 2003.

requested from Eschelon. Eschelon indicated that this was its intent in the following ways:

1. Eschelon clearly marked its cover letter, filed with Marlene H. Dortch, Secretary, FCC, as “Ex Parte.”
2. Eschelon stated in its Ex Parte cover letter to Ms. Dortch that it was providing “two copies of emails, including attachments, provided to the Department of Justice by Eschelon, in response to questions from the Department.”
3. When using the electronic filing tool, Eschelon chose the document type for a notice of Ex Parte, and not the alternative document type for Comments. If one goes in to the FCC web site now, documents filed by other Parties around the same time frame are labeled as “Comments,” whereas Eschelon’s filing is labeled as “Notice.”<sup>3</sup>

Therefore, Eschelon’s filing was an Ex Parte submission pursuant to the permit-but-disclose rules (per the DOJ’s interpretation of those rules as Eschelon understood the DOJ request). In Footnote 36, the FCC cites its March 23, 2001 Public Notice that is attached to its September 4, 2003 Public Notice in this matter. The March 23, 2001 Public Notice has two separate sections addressing requirements for (1) “Comments and Replies by Interested Parties” (Part D, page 7); and (2) “Ex Parte Rules – Permit-But-Disclose Proceeding” (Part G, page 10). Although the FCC discusses the procedures applicable to the former type of filing in Footnote 36, Eschelon’s filing falls into the latter category. Eschelon was not making “substantive legal and policy arguments” to the FCC (*see* Footnote 36); it was disclosing a written communication, on an Ex Parte basis, at the request of the DOJ. In fairness, this should be made clear.

Eschelon asks the Commission to restate or delete Footnote 36. Surely, in the many 271 proceedings that have come before the FCC, other companies have filed Ex Parte permit-but-disclose materials that, at least in some respects, were not mentioned by the FCC. The Order could be silent on the issue. Alternatively, the FCC could modify the Footnote to delete the information that suggests that Eschelon failed to meet some burden. The permit-but-disclose rules do not impose the burden described in Footnote 36.

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<sup>3</sup> See [http://gullfoss2.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch\\_v2.hts](http://gullfoss2.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch_v2.hts).

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As indicated above, Eschelon files this letter before filing a more formal exception in the hope that the record can be corrected with the least effort by all, as this does appear to be a misunderstanding. Please call me if you have any questions.

Sincerely,

Karen L. Clauson  
Senior Director of Interconnection  
Eschelon Telecom, Inc.  
730 Second Avenue South, Suite 1200  
Minneapolis, MN 55402  
612-436-6026

cc: Filed electronically  
Email distribution

-----Original Message-----

**From:** Jodi.Smith@usdoj.gov [SMTP:Jodi.Smith@usdoj.gov]  
**Sent:** Thursday, December 04, 2003 3:52 PM  
**To:** 'klclauson@eschelon.com'  
**Cc:** 'jjoxley@eschelon.com'  
**Subject:** RE: WC Docket 03-194/FCC footnote 36

Karen,

Staff requested that Eschelon file the materials Eschelon submitted to the Department of Justice for our review during Qwest's 271 application for Arizona as ex parte materials with the FCC, pursuant to the FCC's March 23, 2001 Public Notice and the September 4, 2003 Public Notice (Arizona-specific filing requirements). Our understanding of the situation is that Eschelon's filing(s) did not comply with the FCC rules. If you have any further questions about your filing in the Arizona docket, you can call Kathy Carpino at the FCC (202)418-1593.

Thank you.  
Jodi Smith